Filed 12/28/18 P. v. Hays CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JESSICA HAYS, Defendant and Appellant.	C085119 (Super. Ct. No. 16CF04043)

Defendant Jessica Hays pleaded no contest to unlawful sexual intercourse and furnishing marijuana to a minor. The trial court granted defendant probation for three years, ordered her to pay various fines and fees, and ordered her to register as a sex offender pursuant to Penal Code section 290.006.[1]

On appeal, defendant contends the order to register should be reversed because the trial court failed to find she "posed a risk of re-offense" and failed "to state its reasons for

---

[1] Undesignated statutory references are to the Penal Code.

such a conclusion on the record." We conclude defendant forfeited her right to challenge the registration order on these grounds.

Defendant further contends the trial court erred in imposing penalty assessments on the mandatory laboratory fee. Based on a recent Supreme Court case, there was no error. Accordingly, we affirm the judgment.

BACKGROUND

Defendant, 40 years old, took in her daughter's friend, the victim, a 16-year-old boy who had been " 'kicked out' " of a group home for drug use and other behavior. Defendant bought the victim clothes and supported him; the victim continued to use drugs.

One day, defendant went to the victim's group home and said she was there to take him to school. Instead, she took him home, smoked marijuana with him, and had sex with him. The victim did not want a sexual relationship with defendant. He felt a connection to her but was not attracted to her. Defendant, however, continued to supply him with marijuana and methamphetamine. Frequently, defendant and the victim would use the drugs together and defendant would have sex with the victim. The victim was under the influence of drugs most of the time defendant had sex with him.

Defendant became pregnant with the victim's child. Defendant continued to have sex with the victim while she was pregnant. When born, the child tested positive for methamphetamine. Angry that his child tested positive for methamphetamine, the victim contacted law enforcement authorities. He provided social media messages that defendant sent to him and agreed to submit to a DNA test to prove he was the baby's father. The messages between the victim and defendant made it clear defendant had been having sex with the victim and the child was his. Defendant and the victim argued vehemently about custody of the baby, each threatening the other.

On August 24, 2016, the victim participated in a pretext phone call with defendant. During that call, defendant told the victim she had to say "Chris" was the father of the baby or she would go to jail. But, defendant also admitted a DNA test would prove the victim was the baby's father. Defendant accused the victim of taking advantage of her by using her for drugs. They argued until defendant said the victim would end up like his father, at which point the victim hung up.

The People charged defendant with unlawful sexual intercourse (§ 261.5, subd. (c)), furnishing a controlled substance to a minor (Health & Saf. Code, § 11380, subd. (a)), and furnishing marijuana to a minor (Health & Saf. Code, § 11361, subd. (b)). Defendant pleaded no contest to unlawful sexual intercourse and furnishing marijuana to a minor. In exchange, the remaining charge was dismissed with a *Harvey*[2] waiver.

Prior to sentencing, the trial court appointed Don Stembridge, Ph.D., to conduct an evaluation of defendant pursuant to section 1203.067. Dr. Stembridge concluded defendant "poses low risk of sexual reoffense" noting defendant was already "participating in sex offender treatment and is quite capable of benefitting from this treatment." Dr. Stembridge also noted defendant had been clean and sober following the birth of her baby and was regularly attending AA meetings.

In his report, Dr. Stembridge acknowledged the sex offender risk assessments used to assess defendant "were normed on male sex offenders, since the female gender is rarely convicted of sex offenses in comparison to males. However, the preliminary research indicates the same risk factors for sexual reoffense apply fairly equally well to females."

---

[2] *People v. Harvey* (1979) 25 Cal.3d 754.

The probation department recommended defendant be sentenced to serve an aggregate term of five years eight months in state prison and ordered to register as a sex offender.

At sentencing, the trial court indicated its intent to depart from the probation department's recommendation and grant defendant formal probation. The People argued this was a prison case, and defendant should not be granted the leniency of probation. Defendant argued in favor of probation and against an order requiring defendant to register as a sex offender. Defendant asked the court to "withhold on that 290 registration," and impose the requirement only if she failed to successfully complete probation.

The People responded: "if the Court is granting probation, the defendant is getting a big break in this case.

"And taking other cases into view, this case involved numerous 261.5s, numerous sexual encounters with an underage boy.

"Not only did it include numerous instances of sexual abuse, it also included furnishing that boy with methamphetamine, which makes it unusual from other instances of the same crime; therefore, the People are asking the Court to impose the 290."

Defendant argued registration should not be ordered because Dr. Stembridge had all this information before him and still found defendant was at low risk of reoffending.

The trial court granted defendant three years of formal probation with numerous terms and conditions. The court explained its decision: "She has no prior record; she appears willing and able to comply with the terms of probation; she appears remorseful; she is eligible for probation; she by all [ac]counts has been doing very well in the sex offender treatment. By all [ac]counts she has been doing very well in dependency court; therefore, the imposition of the sentence is suspended." The court advised defendant she

would go to prison if she failed to succeed on probation; defendant acknowledged she understood.

The court also ordered defendant to register as a sex offender: "The Court does feel given the circumstances of this case, registration is appropriate. So the court will order registration pursuant to [section] 290 as stated in condition No. 18." The court ordered defendant to pay various fines and fees, imposed numerous other conditions of probation then asked the parties if there was "[a]nything further." The parties each indicated there was nothing further. The court once again advised defendant she would go to prison if she violated probation and the hearing was concluded.

DISCUSSION

I

Sex Offender Registration

Defendant contends the order requiring her to register as a sex offender "must be reversed and stricken because the trial court failed to exercise its discretion based on proper factors and failed to state its reasons adequately on the record." The Attorney General responds that because defendant did not object on this ground in the trial court, she has forfeited the claim on appeal. We agree with the Attorney General.

Section 290.006 gives the trial court discretion to impose a registration requirement "if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification." (§ 290.006.) The statute requires the court to "state on the record the reasons for its findings and the reasons for requiring registration." (§ 290.006.) "By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for

and against registration in each particular case." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197.) And since one of the purposes of the registration requirement " ' " 'is to assure that persons convicted of the crimes enumerated [in section 290] shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future' " ' " (*Hofsheier*, at p. 1196), "one consideration before the court must be the likelihood that the defendant will reoffend." (*People v. Garcia* (2008) 161 Cal.App.4th 475, 485, disapproved on another ground in *People v. Picklesimer* (2010) 48 Cal.4th 330, 335.)

"Complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) The forfeiture rule applies as long as the defendant was afforded a meaningful opportunity to object. (*Ibid*.) "[A] meaningful opportunity to object means that the defendant [must] be given the opportunity to address the court on the matter of sentence and to object to any sentence or condition thereof imposed by the court. In short, it refers to procedural due process . . . ." (*People v. Zuniga* (1996) 46 Cal.App.4th 81, 84 (*Zuniga*).)

In *Zuniga*, the trial court revoked the defendant's probation and sentenced him to state prison without providing a statement of reasons for its decision not to reinstate his probation. (*Zuniga*, *supra*, 46 Cal.4th at p. 83.) On appeal, the defendant argued there had been no waiver because the trial court's failure to announce its tentative decision had deprived him of a meaningful opportunity to object. (*Id.* at p. 84.) The Court of Appeal rejected that argument, noting that when defendant's probation was revoked, he "was in court with counsel, was given the opportunity to address the court on the sentencing issue, heard the court pronounce sentence, stated that he understood it, and voiced no objections when he received the mitigated term. Nothing in the record suggests that [defendant] or defense counsel was precluded from objecting to the sentence or was in

any way denied a meaningful opportunity to state his case for an alternative sentence or question the court's reasons for a prison sentence. The record also reveals a presentence report by the probation officer recommending that probation be revoked and the previously suspended sentence be imposed. Consequently, procedural due process—'a meaningful opportunity to object'—was provided." (*Ibid*.)

Here, defendant was given a meaningful opportunity to object. The probation report recommended defendant be ordered to register as a sex offender. Defendant was present at the sentencing hearing and represented by counsel. Counsel argued defendant should not be required to register because she was at low risk for reoffending. The court explained its reasons for granting defendant probation and asked defendant if she understood she would go to prison if she failed on probation. She acknowledged her understanding. The court, after imposing sentence asked counsel if there was "[a]nything further;" defendant's counsel said there was not. In short, defendant had ample opportunity to request a more complete statement of reasons for ordering her to register as a sex offender and her failure to do so precludes her from raising the issue on appeal. (*People v. Scott, supra*, 9 Cal.4th at p. 356; *Zuniga, supra*, 46 Cal.App.4th at p. 84.)

Defendant argues she did not forfeit her claim on appeal because trial counsel objected to registration on the ground she was not likely to reoffend. This argument does not work, because the objections are to different things. (See *People v. Bautista* (1998) 63 Cal.App.4th 865, 871 (*Bautista*).) Although here defendant initially objected to *registration* and argued in support of that objection that she was not likely to reoffend, she did not later object to the *deficiencies* in the trial court's ultimate ruling that form the basis for her claim on appeal that the ruling was devoid of required findings.

Bautista illustrates the distinction. In that case, the trial court stated on the record that "it believed registration was appropriate 'in view of the circumstances surrounding

the offense.' " (*Bautista, supra*, 63 Cal.App.4th at p. 868.) The defendant "objected to the registration requirement, but did not object to the court's failure to provide a more complete statement of reasons for its findings and for requiring registration." (*Ibid*.) Noting the defendant had been given "ample meaningful opportunity . . . to argue against registration," the Court of Appeal held the trial court's failure to articulate its reasoning more clearly could not be raised for the first time on appeal. (*Id.* at p. 871.) The error was a "routine defect [that] could easily have been prevented and corrected had it been brought to the court's attention. [Citation.]" (*Id.* at p. 868.)

Here, as in *Bautista*, the parties argued the merits of the court's decision to impose a registration requirement. And here, as in *Bautista*, defendant did not object to a "routine defect" that "could easily have been corrected." (*Bautista, supra*, 63 Cal.App.4th at p. 868.) Defendant raised no objection at the hearing, even after sentencing when the court asked counsel if there was anything further to discuss. On this record, the issue has been forfeited.

In her reply brief, defendant raised a new argument and claimed, for the first time that the trial court's registration order "must be stricken because the trial court's order was not reasonable under the facts or the law." "Points raised in the reply brief fo the first time will not be considered, unless good reason is shown for failure to present them before." (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) Defendant does not explain why she could not have made this contention earlier and thus it is forfeited.

Were we to consider the argument, defendant would not prevail. Because " '[w]here there are no express findings of fact, it is implied that the trial court . . . made whatever findings were necessary to support the judgment or order. [Citations.]' " (*People v. Fulkman* (1991) 235 Cal.App.3d 555, 560.) As previously noted, the record reflects argument on defendant's potential to reoffend. In rejecting the defense's

arguments, the court impliedly found that after considering the totality of the circumstances, including evidence regarding defendant's potential to reoffend, the balance weighed in favor of ordering defendant to register. (See *People v. Garcia, supra*, 161 Cal.App.4th at pp. 483, 485 [in order to make discretionary determination whether to require registration, court should consider all relevant information, including likelihood defendant will reoffend].)

Moreover, the court's exercise of its discretion was not unreasonable. Defendant took advantage of an at-risk minor. She took him in when he was struggling at the group home. She groomed him by supporting him and buying him clothes. She gave him drugs and then she had sex with him multiple times while he was under the influence of drugs.

On balance, under these circumstances, it was not unreasonable for the court to exercise its discretion and order defendant to register as a sex offender.

II

Criminal Laboratory Fee

Defendant contends the trial court erred in imposing the penalty assessments on the criminal laboratory fee (Health & Saf. Code, § 11372.5) because, she argues, the criminal laboratory fee is not a punishment subject to penalty assessments. In a recent decision, our Supreme Court concluded the criminal laboratory fee is a punishment. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1122.) We are required to follow that precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because the criminal laboratory fee is a punishment, there was no error in imposing the penalty assessments. (§ 1464; Gov. Code, § 76000.)

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
DUARTE, J.